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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

Nos. 520 and 521

ANTHONY JOSEPH CIMINI, Petitioner

v.

UNITED STATES OF AMERICA

JOHN O'MALLEY, Petitioner

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONERS' REPLY TO UNITED STATES BRIEF IN OPPOSITION

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The thrust of the government's argument seems to be that a defendant on trial is not entitled to a hearing unless in advance of hearing he is able to prove those facts which only a hearing can bring out.[1] This is reminiscent of Will

[1] "There was, however, no showing that any juror had read . . . this article." U. S. Brief in opposition, p. 6. "The contention that the jury must have read the newspaper article was nothing more than tenuous speculation." id, p. 7. "There was, however, no indication that a member of the prosecution staff had referred to any defendant in prejudicial terms." id, p. 8.

Rogers' description of a bank as a place where a fellow can borrow money if he can prove he doesn't need to.

The government brief, p. 7, footnote 3, attempts to explain away the conflict of circuits by asserting that the other circuits were dealing with prejudicial publicity "during trial." If there is a distinction between jury exposure to prejudicial publicity during trial and exposure to such during deliberations—the government articulates none—the latter more urgently requires a hearing to assure that the jury has been "immunized from outside influence." *U. S. v. D'Antonio* (CA-7, 1965) 342 F2d 667.

Finally, at page 9 of its brief the government goes outside the record to assert that the only information given to the press was in the "standard release made at the time of the indictment—, i.e., the names, ages and addresses of the defendants, a copy of the indictment and information as to the maximum penalty."[2] Aside from the fact that the

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[2] We believe that the Solicitor General has been misinformed as to the nature of the "standard release" in the Detroit area. The special task force agents and attorneys who handled petitioners' prosecution were responsible for the indictment of petitioner Cimini two weeks ago on an unrelated matter. The acting U.S. Attorney and the Agent in charge were interviewed on television as follows:

> Commentator: "Acting U.S. Attorney Ralph Guy and FBI Special Agent in Charge Neil Welsh detailed events leading up to the arrests early this morning."
>
> RALPH GUY: ". . . ment (the station started the voice late here) which was returned earlier this week charging fifteen individuals, *seven of whom have been identified at various times as members of the Detroit area organized crime syndicate. The indictment also mentions one other person, not a defendant, who has been mentioned in testimony before the United States Senate. The eight* individuals so identified include Jack Tocco, Dominic Corrado, Matthew Rubino, Anthony Besase, Dominic 'Sparky' Corrada, Peter Vitale, and Anthony Cimini. The indictment specifies that

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record here, even without a hearing, belies the assertion since at least some information was given to the press by the government *during trial* [D-12], the ex parte, off-the-

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(continued from preceding page)

in 1960 a scheme was devised whereby three individuals set up a furniture store with the specific purpose in mind of securing merchandise, dissipating the assets, and then throwing the business into bankruptcy, thus fraudulently defrauding creditors. In 1962 three individuals were indicted on this charge, two of them were convicted, and the third was acquitted. The defendants that were arrested today are specifically charged with aiding and abetting in the dissipation of the assets and the merchandise, in connection with the bankruptcy fraud knowing that the whole operation was originally conceived to be put into bankruptcy."

COMMENTATOR: "Specifically who, that's named in the indictment is connected with the Hazel Park Raceway?"

NEIL WELSH: "Well, Jack Tocco, of course, is on the Board of Directors and is one of the executive officers at the Race Track. And there's one other individual as well."

(Transcript of broadcast of September 25, 1970 on WXYZ-TV at 6 p.m. as recorded by Radio TV Reports, Inc., 41 East 42nd Street, New York, N.Y. 10017. Emphasis is added.)

A page one story in the local paper of the same day read, in part:

"[Neil J.] Welsh [Michigan Head of the FBI] said eight of those named in the indictment have been identified at various times as 'members of the Detroit-area organized crime syndicate.'

"Tocco and Corrado were named by the Department of Justice in the Congressional Record on Aug. 12, 1969, as being among the 'top nine Mafia leaders in Detroit.'"

The article went on to give details of the evidence—details which were not in the indictment.

"Finally, as federal agents say the alleged schemers fully expected, the firm's creditors demanded an accounting. . . . That fall . . . store employees . . . stashed the goods, it is charged, in two hidden warehouses—first on Warren and later on Mack." (Ironically, upon defense demands for such information prior to moving for a bill of particulars, the government refused to furnish the defense with the information contained in the press release.)

record, months after the fact investigation by the Solicitor General hardly can be an adequate substitute for an adversary hearing in open court at the time of trial.

Respectfully submitted,

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